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No. 81-2399
No. 82-358

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY
and PENNSYLVANIA ELECTRIC COMPANY
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, The Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae*

in support of Petitioners. In support of this motion the Chamber states:

1. The Chamber is the largest federation of business organizations in the United States. At present, the Chamber has in excess of 250,000 members, including over 240,000 corporations, partnerships, proprietorships and individuals, as well as 1,350 trade associations, and 2,700 local and state chambers of commerce.

2. The Chamber regularly presents its members' views to the courts on issues of broad importance to its members, and often files briefs in support of petitions for writs of certiorari.*

3. The National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 ("NEPA"), is a very broad statute that impacts upon much of the activities of federal agencies, including licensing and permit procedures of regulatory agencies. Many of the Chamber's members, in the normal course of their businesses, become involved in projects that must withstand scrutiny under NEPA.

4. Because the application of NEPA is so pervasive, it is important that it be interpreted in a manner that serves its purposes, but does not unduly infringe upon matters that are beyond its purview.

5. The decision of the Court of Appeals expands the scope of NEPA well beyond the intent of Congress and has extremely significant potential impact on many federal programs and activities and on many matters of direct concern to the members of the Chamber. Because the decision represents an extreme case of "judicial legislating", the Chamber believes that review by this Court is critical.

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* *See e.g., First National Maintenance Corp.* v. *NLRB*, 449 U.S. 1076 (1981); *Northwest Airlines* v. *Transport Workers of America, AFL-CIO, et al.*, 447 U.S. 920 (1980); *Rockwell International Corp.* v. *City of New York, et al.*, No. 81-904, ____U.S.____, 102 S.Ct. 1038 (Jan. 11, 1982); *Weyerhaeuser Company, et al v. Lyman Lamb Co., et al.*, Nos. 81-1618, 81-1619, ____U.S. ____, 102 S.Ct. 2232 (May 17, 1982).

For these reasons the Chamber requests the permission of the Court to file the attached brief which sets forth more fully its views on the need for review of this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This brief is filed on behalf of The Chamber of Commerce of the United States ("Chamber") contingent upon the Court's

granting the Motion for Leave to File a Brief Amicus Curiae to which this brief is attached.

STATEMENT OF INTEREST

The interest of the Chamber is set forth in its Motion for Leave to File a Brief Amicus Curiae. The Chamber respectfully refers the Court to the Motion.

STATEMENT OF THE CASE

As set forth in detail in the two petitions for writ of certiorari, this case concerns the restart of a previously operating nuclear power plant near Harrisburg, Pennsylvania, known as Three Mile Island Unit 1 ("TMI-1"). A second nuclear plant at the same site ("TMI-2") had previously suffered an accident affecting its reactor and the restart of TMI-1 was postponed for various reasons. Upon appeal by respondent, People Against Nuclear Energy, the Court of Appeals (in a split decision with Judge Wilkey dissenting) reversed a decision of the Nuclear Regulatory Commission ("Commission") and held that the psychological stress of a restart of TMI-1 on the residents of the Three Mile Island area constituted an environmental effect that must be considered by the Commission under Section 102(2)(C) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332(2)(C). The Court of Appeals then remanded the case to the Commission to determine whether there was sufficient new information or changed circumstances so as to require a supplemental environmental impact statement ("EIS") evaluating the psychological stress and community deterioration that might result from restart of TMI-1.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals greatly expands the requirements of NEPA, 42 U.S.C. §§4321-4347, on federal agencies and thus imposes substantial new burdens on persons

whose activities are affected by federal actions subject to NEPA. Review of that decision by this Court is justified because of the broad impact of the decision nationwide and because it exceeds the proper role of the Court of Appeals by substituting its policy judgment for the judgment of Congress.[1]

Section 102(2)(C) of NEPA, 42 USC §4332(2)(C), provides that all agencies of the Federal Government shall—

> . . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> . . . .

The decision of the Court of Appeals greatly expands this provision in two respects. First, it holds that the NEPA obligation is not limited to the separate occasions when there is a proposed federal action but rather is a "continuing obligation" by reason of the "continued exercise of supervisory responsibility" by the Commission over the plant. Pet. App. at

[1] Review of the Court of Appeals' decision is also justified because it is in conflict with numerous decisions of other courts of appeals. However, because this ground for review is more than adequately presented in the two separate Petitions filed with this Court in this case we see no need to add to the presentations made there.

19a.[2] Second it holds that the environmental factors that must be considered under NEPA include the psychological stress of federal action permitting restart of TMI-1, but does not require that this stress result from any adverse impact on the environment caused by the federal action. Pet. App. 13a, 16a-17a.

I. THE COURT OF APPEALS DECISION THAT PHYCHOLOGICAL STRESS CONSTITUTES AN ENVIRONMENTAL EFFECT UNDER NEPA NECESSARILY REQUIRES THAT THE ANALYSIS OF PHYCHOLOGICAL FACTORS BE SUBJECT TO THE FULL RANGE OF NEPA PROCEDURES.

The EIS requirements of NEPA impose significant requirements on federal agencies and have significant impact on persons affected by major federal actions. Compliance with the existing EIS process requires a major effort by federal agencies. In 1980 a total of 966 draft, final or supplemental EIS's were filed by federal agencies. *Environmental Quality 1981, 12th Annual Report of the Council on Environmental Quality*, 282. CEQ has not published numbers on how many environmental assessments were prepared in 1980, but has estimated that "thousands" were prepared in 1979. *Environmental Quality 1980, Eleventh Annual Report of the Council on Environmental Quality*, 384. During 1980, 140 separate lawsuits were filed against federal agencies alleging NEPA violations, principally involving whether an agency was required to prepare an EIS or whether the EIS was legally inadequate. *Environmental Quality 1981, supra*, 183, 185.

The NEPA process covers the whole range of federal activities and has an enormous impact on business. For example, in the energy area alone, projects affected by major federal actions and thus subject to the NEPA process include nuclear plants, electric transmission power lines, hydro-electric power projects, outer continental shelf oil and gas lease sales, coal prospecting and mining activities, fossil fuel power plants, oil and gas drilling projects and pipelines. *Environmental*

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[2] References are to Petitioners' Appendix in Metropolitan Edison Co., No. 81-2399.

Quality 1979, The Tenth Annual Report of the Council on Environmental Quality, 590. As another example, establishment or expansion of a military base may constitute a major federal action and thus be subject to NEPA, *cf. Weinberger v. Catholic Action of Hawaii/Peace Education Project,* No. 80-1377, ____ U.S. ____, 102 S.Ct. 197 (Dec. 1, 1981).

NEPA requires that all federal agencies must consider the environmental impact of proposals for legislation or proposals for other major federal action significantly affecting the quality of the environment. 42 U.S.C. §4332(2)(C). The Council on Environmental Quality ("CEQ") has promulgated regulations defining the obligations NEPA imposes, 40 C.F.R. §§ 1500-1508, and these regulations are binding on all federal agencies. 40 C.F.R. §§ 1500.3, 1507.1.

The CEQ regulations broadly define proposals for "major federal actions." These include actions with effects that "may" be major; actions entirely or partly "financed, assisted, conducted, regulated or approved" by federal agencies; legislative proposals; treaties and international conventions or agreements; adoption of programs; approval of specific projects, including actions approved by permit; etc. 40 C.F.R. §§ 1508.17, 1508.18.

If there is a question whether an activity is a major federal action requiring preparation of an EIS, a federal agency must prepare an environmental assessment. 40 C.F.R. § 1501.4(a), (b). An environmental assessment is a preliminary study to determine whether a full blown EIS is necessary, but nevertheless must itself be a rather comprehensive document. See 40 C.F.R. §§ 1508.9, 1501.4. If the environmental assessment so indicates, the agency is required to prepare an EIS. 40 C.F.R. 1501.4.

An EIS is a detailed written statement that is to provide "full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. The statement "must rigorously explore and objectively evaluate all reasonable alternatives" and discuss the reasons for eliminating other alternatives; "devote

substantial treatment" to each alternative; discuss the "alternative of no action"; and discuss "appropriate mitigation measures." 40 C.F.R. §1502.14. The statement must discuss the environmental consequences of the various alternatives. 40 C.F.R. § 1502.16. The agency is required to identify any scientific methodologies used and make explicit reference to the scientific and other sources relied upon . 40 C.F.R. § 1502.24.

An EIS for a major federal action must be prepared in two stages—draft and final—and may be supplemented. 40 C.F.R. § 1502.9. A draft EIS must satisfy all the requirements for a final EIS. *Id.* A draft EIS must be submitted for comment to the public and any federal agency which has special expertise with respect to the environmental impact involved and such agency must comment on such environmental impact. 40 C.F.R. §§ 1502.19, 1503.2. The final EIS must respond to all comments received and such response must be either to modify the alternatives included in the proposed action, develop and evaluate new alternatives, supplement or modify the agency's analysis, make factual corrections or explain in detail why the comments do not warrant further response. 40 C.F.R. § 1503.4.

A federal agency reviewing an EIS may make a judgment on the acceptability of the anticipated environmental impacts and refer the matter to CEQ if they are unsatisfactory. 40 C.F.R. § 1504.1; 42 U.S.C. § 4332(2)(C); 42 U.S.C. § 7609. After such referral CEQ may take various actions including holding hearings and further referring the matter to the President. 40 C.F.R. § 1504.3.

Every agency of the federal government is required to have the resources and personnel to comply with the requirements of Section 102(2) of NEPA, 42 U.S.C. § 4332(2). 40 CFR § 1507.2.

Finally, private litigants may obtain an injunction against proposed major federal action if the agency fails to prepare an EIS, or if the EIS is inadequate because of failure adequately to consider the various effects on the environment, or reasonable alternatives to the proposed action. *Natural Resources Defense Council v. Morton,* 458 F.2d 827 (D.C. Cir. 1972).

In short, the NEPA process is an extensive one. It requires significant expenditure of federal agency resources and takes considerable time to accomplish. Private persons affected by a proposed major federal action may sue to force an agency to comply with its NEPA obligations. Thus, the Court of Appeals decision that psychological stress constitutes an environmental effect under NEPA means that an agency will have no choice but to apply the full panoply of NEPA requirements to any proposed major action where psychological stress is alleged—*e.g.*, analysis of the psychological stress, evaluation of alternatives, discussion of mitigation measures, referral to other agencies, etc. Alleged failure to comply with these requirements will subject an agency to litigation to compel compliance. Such litigation in turn may result in considerable expenditures in litigation and considerable costs occasioned by delay in taking the proposed federal action, both by the federal agency and by private persons benefiting from the proposed action.

II. THE DECISION OF THE COURT OF APPEALS ON THE CONTINUING NEPA OBLIGATION IS CONTRARY TO THE BASIC STRUCTURE OF NEPA.

At present the NEPA process is required only for a *proposed* major federal action. Although the CEQ regulations provide for a "supplemental" EIS, it is required only "if (i) The agency makes substantial changes in the *proposed* action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the *proposed* action or its impacts." 40 C.F.R. § 1502.9(c)(1). (emphasis added.) *See also,* 40 C.F.R. 1508.23 where "proposal" is defined and 40 C.F.R. § 1502.5 discussing the timing of preparation of an EIS. Where broad actions are involved, the CEQ regulations provide for an EIS on the broad proposal and for subsequent EIS's on the more narrow subsequent proposed actions. 40 C.F.R. § 1502.4. Thus, if there is no proposed major federal action but merely an ongoing activity subject to federal regulation there is no requirement to prepare a supplemental EIS.

Although the petitions for certiorari in this case do not present for review the question whether NEPA is applicable when there is no proposed major federal action, Petitioners,

The United States of America and the United States Nuclear Regulatory Commission, in No. 82-358 suggest that although the Court of Appeals' decision on this point was wrong it was dictum unnecessary for resolution of the case.[3] Petitioners in No. 82-358 further request that they not be considered to have waived the question if the Court concludes otherwise. Because of the importance of this issue in its application to federal agencies that have ongoing supervisory functions, the Chamber urges the Court to conclude that this issue is properly presented.

The Court of Appeals' concept of a "continuing obligation" when there is no proposed action is contrary to the basic idea underlining NEPA. NEPA essentially establishes a detailed procedural arrangement prior to a decision on a proposed federal action that requires a thorough analysis of possible environmental effects so they may be considered in making the decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 417-418 (1976) (concurring and dissenting opinion). NEPA does not require that environmental factors control a decision on a proposed federal action, only that they be taken into account. Nor is NEPA a general regulatory statute requiring federal agencies to take continual action on all matters within their authority to improve the quality of the environment. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-8 (1980); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973); *see also*, 40 C.F.R. § 1505.2(c) which makes it clear that NEPA does not require that an agency take action to avoid or minimize environmental harm, but rather only that it explain why it did not. Thus, it is nonsensical to impose the NEPA process after a decision is made and when there is no proposed action, and the imposition of NEPA requirements in that situation adds an

[3] As discussed in footnotes 11 and 12 of the Petition in No. 82-358, the Court of Appeals could have held that the pending decision of the Commission whether to restart TMI-1 constituted a proposed major federal action thus triggering the NEPA process. Such a holding by the Court of Appeals would not have broad applicability to other federal agencies. However, the Court of Appeals decision in this case was not based on such an analysis but rather on the broad statement that the Commission has a "continuing obligation to comply with NEPA" (Pet. App. 19a) whether or not there is any proposed action.

unnecessary burden that serves no useful purpose. *See, Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council,* 435 U.S. 519, 554-5 (1978), *quoting ICC v. Jersey City,* 322 U.S. 503 (1944). Permitting the Court of Appeals' decision on this point to stand uncorrected could turn the already extensive NEPA procedure into an unending process subject to the whims of imaginative interest groups seeking to have a federal agency institute a new environmental study of some new information possibly relating to the environmental effect of an existing activity.

III. THE DECISION OF THE COURT OF APPEALS ON PSYCHOLOGICAL STRESS IS AN UNREASONABLE EXTENSION OF NEPA.

Although the decision of the Court of Appeals suggests in places that it may be limited to the unique situation arising from the accident to the reactor at TMI-2 (Pet. App. 16a-17a), the decision goes on to say that "we need not attempt to draw a bright line". *Id* at 17a. More importantly, as discussed at length in Judge Wilkey's dissent (*Id* at 43a-48a), it is impossible to find a rational basis for limiting the decision to a situation where an action is proposed after a traumatic event in the same locale affected by the proposed action. Thus, it takes no imagination to conclude that the Court of Appeals' decision could require the Defense Department to consider the psychological stress on the surrounding community of having a potential military target nearby as the result of establishment or expansion of a military base in a particular locale. Likewise under the Court of Appeals' decision, submission to the Senate of a nuclear test ban treaty or amendments to the NATO Treaty could very well require an EIS on the psychological stress that might be engendered by such treaties. Or the Federal Aviation Administration could be required to consider the psychological stress on the community caused by operation of an airport because of fear of a plane crash.[4]

It requires no citation of authority to note that psychological assessments are often amorphous, imprecise and

[4] These and other possibilities would be even more far reaching if the Court of Appeals' concept of a "continuing obligation" were applicable to the situations.

considerably in dispute even by professionals in the mental health field. Controversy over the insanity defense in criminal trials provides an obvious example. *See also, Hanley v. Kleindienst,* 471 F.2d 823 (2d Cir. 1972), *cert. denied,* 412 U.S. 908 (1973), where the court noted in footnote 10 "... psychological factors are not readily translatable into concrete measuring rods." 471 F.2d 823, 833. The Court of Appeals' decision on psychological stress means that such an inherently ambiguous assessment is subject to the mandatory requirements of the NEPA process discussed in Section I which provide that the agency must discuss "significant environmental impacts"; "must rigorously explore and objectively evaluate all reasonable alternatives"; discuss all "appropriate mitigation measures"; describe the "scientific methodologies used"; etc. 40 C.F.R. §§ 1502.1, 1502.14, 1502.16, 1502.24. Since an EIS dealing with psychological stress must provide "full and fair discussion" of these matters, 40 C.F.R. § 1502.1, the agency's evaluation would seem almost certainly subject to litigation complaining that it was legally insufficient because it failed adequately to consider conflicting psychological views and conflicting views on how to mitigate psychological stress. Given the state of psychological knowledge, plaintiffs should have no difficulty in finding respectable opinion in conflict with the agency's analysis. The effect of the decision is thus to provide an enormously effective means for delaying federal action by an injunction proceeding based on the failure of an EIS adequately to consider other psychological contentions. *See, Natural Resources Defense Council v. Morton,* 458 F.2d 827 (D.C. Cir. 1972).

Another effect of the Court of Appeals' decision is to require new budgetary and personnel resources in federal agencies to deal with psychological environmental impacts. Also, since a draft EIS must be submitted for comment to any federal agency with special expertise concerning the environmental impact involved, as indicated in Section I above, the Court of Appeals decision presumably will require the National Institute of Mental Health to assume a role in reviewing agency EIS's on psychological stress, a function that the Congress was rather unlikely to have had in mind for the National Institute.

Although some of the potential ramifications of the Court of Appeals decision might be desirable as a matter of public policy, extension of NEPA to cover psychological stress is more properly a function of Congress to direct by statute. The decision of the Court of Appeals is totally at variance with the observation of this Court in *Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978):

> NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. See 42 U.S.C. § 4332. See also *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S., at 319, 95 S. Ct., at 2355. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, *Consolo* v. *FMC*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966), not simply because the court is unhappy with the result reached.

Psychological review of a proposed major federal action would be complex, time consuming and difficult. Moreover, it is unlikely that any federal agency has the staff or competence to perform such task. To impose such a requirement full blown from the present NEPA statute which is silent on the subject is an extraordinary piece of judicial legislation that should be reviewed and reversed by this Court. If such a broad and far reaching requirement is imposed it should be done by clear Congressional action which, through statutory language, hearings, reports and debate, would provide discussion and guidance on the scope of the requirement and the procedures to be followed in its application.

CONCLUSION

The Chamber respectfully urges that the petitions for certiorari be granted.

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